

Maryland Department of Environment

Wetlands and Waterway Program
Water and Science Administration



WSSI-2021 Regulatory Updates Webinar
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When is a Section 401 certification required in Maryland?



A CWA Section 401 certification is required for any federal license or permit that authorizes an activity that may result in a discharge.

Examples: U.S. Army Corps of Engineers permits (Nationwide Permits, Regional General Permits, State Programmatic General Permits, Standard Individual Permits), FERC, USCG

How long does Maryland have to make a certification decision?



- CWA Section 401 requires that certifying authorities act on a certification request within a reasonable period of time, which shall not exceed one year.
- As allowed under the Rule, the federal licensing or permitting agency establishes the reasonable period of time and may adopt that reasonable period of time into the federal licensing agencies regulations.
- ACOE has regulations stating that the reasonable period of time for a state to make a decision is 60 days, unless the District Engineer decides more or less time is reasonable.

2019 ACOE Regional General Letter (RGL)



- In August 2019, ACOE Headquarters issued an RGL requiring that the ACOE abide by its regulations and required WQC decisions within 60 days, unless the state has requested and received an extension to that time.
- When establishing the reasonable period of time in a state extension request, as in the final rule, the ACOE is required to consider the complexity of the proposed project, the nature of any potential discharge, and the potential need for additional study or evaluation of water quality effects from the discharge.
 - Administrative procedures, for example, satisfying a states regulatory requirements regarding public notice or hearing requirements would be dismissed as an acceptable reason for granting an extension.

ACOE 2019 RGL



Prior to the ACOE 2019 RGL The ACOE Districts governing Maryland publicly noticed when a Standard Individual Permit (SIP) is required. In Maryland the ACOE notice stated that Maryland had up to one-year to make a WQC decision for a majority of projects that required a WQC. By this notice, ACOE automatically granted an extension to the 60-days in ACOE regulation as reasonable through the public notice.

ACOE 2019 RGL



Post ACOE 2019 RGL In Maryland ACOE stopped public notice publications determining one year was reasonable, instructed applicants to obtain a WQC from Maryland, implemented the hard 60-day deadline for a WQC decision for all qualifying projects and required extension requests be submitted from Maryland for ACOE approval.

Maryland evaluated its WQC regulations and determined that in order to preserve the timeclock for a state WQC decision, that it needed to immediately implement **new** WQC processing procedures.

2020 New Rule, Section 401



At about the same time in 2019, EPA was being directed to reevaluate Section 401 (April 2019 E.O. 13868)

June 2020 EPA finalized a New Rule, **effective September 11, 2020.**

Both the 2019 RGL and the 2020 WQC Rule required Maryland to evaluate its WQC process and implement changes.

Maryland's WQC Requests



4 Important Steps

1. Determining a WQC is required.
2. Submit Pre-filing Meeting Request.
3. Map out the timeclock to a decision.
4. Submit in writing a WQC request in accordance with Section 401 and COMAR requirements.

HOW DO I KNOW IF MY PROJECT NEEDS A INDIVIDUAL WQC?



- The federal licensing or permitting agency will advise you if your project requires a Individual WQC from Maryland.
- ACOE will inform you based on how they are categorizing your project activities for a permit. Except for the Finalized 2021 Nationwide Permits (NWPS), a WQC is already issued for a permittee for the MDSPGP, 2017 NWP's, RGP's that are in effect in Maryland.

2020 Rule: PREFILING MEETINGS



2020 Rule - requires a project proponent to request a pre -filing meeting with the certifying authority **30-days prior** to filing an request for a WQC.

- The WQC CANNOT be received by Maryland earlier than 30-days from the date of the prefilling meeting request.
- Maryland does not have to hold a prefilling meeting request or hold a meeting prior to a WQC request, but the project proponent MUST request the meeting and wait 30 days before filing a WQC request.

A pre-filing meeting request does not expire - meaning you can request the prefilling meeting and wait the minimum 30 days or wait longer to submit a WQC request for the project subject to the original prefilling meeting request. If the project changes substantially a new pre-filing meeting request may need to be filed.

Pre-filing Meeting requests :

<https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/PreApplicationIntroduction.aspx>

When does the Section 401 timeclock begin?



- The pre-filing meeting request does not start the state timeclock to make a decision on a WQC. It starts only the requestors timeclock to be able to submit a WQC request.
- **MDE requires a WQC to be mailed with supporting documentation. We do not accept emailed requests.** The final rule defines “certification request” as a written, signed, and dated communication that includes project documents and information as specified in the final rule.
- The reasonable period of time begins upon receipt by Maryland of a certification request.
- **IMPORTANT TO MAP OUT THE DECISION TIMECLOCK BEFORE YOU SUBMIT A WQC** Submitting at the time of a JPA is **NOT recommended or advised in almost all cases.**
- Once MDE receives a WQC request we evaluate the project, consult with ACOE to determine if it will remain a SIP (options), then determine whether MD requires longer than 60 days to make a decision. If we do, we submit a written request to ACOE for a reasonable period of time, not to exceed one year.

WQC REQUEST KEY ELEMENTS



Key Elements: COMAR 26.08.02.10 establishes what a request for WQC should contain in Maryland as considered KEY ELEMENTS to a WQC request. Section 401 also defines what must be contained in a WQC request. The MDE Key Elements document combines 2020 Rule requirements and COMAR 26.08.02.10 requirements.

For WQC associated with a ACOE JPA, other than the necessary statements required under the Rule and COMAR for a request to be considered valid and received, the JPA document **attached** to a WQC request will contain sufficient information regarding the Key Elements for a WQC review to commence. You will be notified by a MDE reviewer if more information is required for MDE to process the WQC request.

Please note that the submission of a JPA is not considered a WQC request. A stand alone WQC request is required. ACOE will inform you if your project requires a Individual WQC after receiving your JPA.

MDE has created a WQC Request and Key Element informational document on the website.

https://mde.maryland.gov/programs/Water/WetlandsandWaterways/PermitsandApplications/Documents/WQC_Request_MDE.pdf

Public Notice and Hearing Requirements



- Public Notice is required for a WQC.
- MDE will make every effort to combine Public Notice procedures for projects with other regulatory resource impacts that also require public notice (i.e. Nontidal, Waterway, Tidal) to incorporate a WQC request.
- Public Hearings will be held if a valid request is received during the public notice comment period
- COMAR requires notice of a WQC hearing to be published in the Maryland Register 45 days prior to the hearing date.

Can MDE or a Requestor STOP the timeclock?



No.

Once MDE has your WQC request, the decision timeclock and ACOE coordination on decision date begins. Timing of a WQC should be carefully considered and coordinated for sensitive or large scale projects. Take advantage of the Prefiling Meeting tool and draft submission coordination for review.

- The timeclock ends when MDE takes any of the following available options before the timeclock expires:
 - Grants certification, grants certification with conditions, denies, or expressly waives certification OR;
 - Federal Agency determines waiver has occurred if the timeclock expired and MDE did not take an above action.

Maryland WQC Conditions



- Under section 401 a State's WQC conditions must be incorporated into a federal permit or license.
- MDE WQC's have a "new look". In accordance with the 2020 WQC Rule each WQC Condition must have a statement of necessity for the protection of water quality and include a legally supportive citation.

Condition “New Look”



Example Condition:

The Certification Holder shall adhere to the time of year restrictions, unless waived or amended by the Department, as identified in a state authorization.

Statement of Necessity for Condition: Restrictions on instream construction are necessary to protect designated uses for propagation and growth of fish, other aquatic life, and wildlife.

Citations: Federal and state laws that authorize this condition include but are not limited to: 33 U.S.C. § 1341(a), (b), & (d); 33 U.S.C. § 1251(b); 33 U.S.C. § 1370; Md. Ann. Code, Env. Article, Title 1, Subtitles 3 and 4; Md. Ann. Code, Env. Article, Title 5, Subtitles 5 and 9; Md. Ann. Code, Env. Article, Title 9, Subtitle 3; Md. Ann. Code, Env. Article, Title 16; COMAR 26.08; COMAR 26.08.02.03.03B(1)(b); 26.08.02.03.03B(2); COMAR 26.23.02.06

Maryland WQC Issuance Requirements



COMAR requires MDE publish the decision to issue or deny a WQC in the Maryland Register. A waiver does not need publication.

The WQC decision appeal period is for 30 days after the WQC decision appears in the Maryland Register.

MDE immediately posts its WQC decisions on its website and sends the decision to ACOE or the federal permitting agency.

Under the existing CWA Rule and regulations ACOE (or any federal agency) is required to send MDE's WQC decision to EPA for neighboring jurisdiction impact evaluation. If EPA determine's there is potential for a neighboring jurisdiction impact, EPA will send the WQC to the jurisdiction within 30 days of receipt of the WQC decision from the ACOE/Federal Agency and begin state coordination under the Rule. A neighboring jurisdiction has 60 days to respond. See Section 401(a)(2) and 40 C.F.R. 121.12.

WQC For Maryland State Programatic General Permit (MDSPGP)



MDSPGP-5

Currently in effect in Maryland until September 30, 2021. Contains a suite of regulated activities that account for over 95% of the federal permitting actions. A WQC was issued for this in 2016.

- If your project qualifies for a MDSPGP-5 activity, then a individual WQC is not required to be obtained.

MDSPGP-6

ACOE proposed the reissuance of the MDSPGP in November 2020 (MDSPGP-6). MDE issued a WQC on March 24, 2021. As required under Section 401 and the 2020 Rule the WQC has been submitted to EPA for review of a neighboring jurisdiction water quality effect.

- In issuing the WQC for the MDSPGP-6, Maryland anticipates that if your project qualifies for a MDSPGP-6 activity, then a individual WQC will not required to be obtained.

Nationwide Permits



Nationwide Permits

Due to the MDSPGP, most Nationwide Permits are suspended for use in Maryland. Those suspended activities are captured in the MDSPGP.

2017 Nationwide Permits

The 2017 NWP that are still in effect in Maryland have received a WQC and an applicant qualifying for a 2017 NWP does not need to obtain an individual WQC. The 2017 NWPs in effect and not replaced by the 2021 NWPs will expire in 2022.

2021 Nationwide Permits



2021 Nationwide Permits

After an accelerated Rule making process the ACOE reissued 16 of the proposed NWP's which became effective on March 15, 2021. This left 40 NWP reissuances pending Final decisions. Some of the reissued NWP's that were reissued by the ACOE replace the 2017 NWP's for existing activities and some are new NWP's. Of those 16 NWP's, 12 are suspended for use in Maryland due to the MDSPGP-5 and will continue suspension due to the proposed MDSPGP-6. The 4 NWP's that are active in

Maryland are:

- ***NWP48. Commercial Shellfish Mariculture Activities***
- ***NWP 52. Water-Based Renewable Energy Generation Pilot Projects- Tidal Waters only***
- ***NWP55. Seaweed Mariculture Activities***
- ***NWP56. Finfish Mariculture Activities***

2021 Nationwide Permit WQC Decision



The ACOE has determined that it will “decline” to rely on Maryland’s WQC issued on December 15, 2020 for the NWP’s effective March 15, 2021. This requires applicants qualifying for a NWP in Maryland to seek an Individual WQC for their project prior to beginning work under the NWP. ACOE will notify you of your requirements. It is unclear how this decision may affect the NWP’s that ACOE has not reissued.

- ***NWP48. Commercial Shellfish Mariculture Activities***
- ***NWP 52. Water-Based Renewable Energy Generation Pilot Projects- Tidal Waters only***
- ***NWP55. Seaweed Mariculture Activities***
- ***NWP56. Finfish Mariculture Activities***

Proposed MDSPGP-6



- Effective date planned for October 1, 2021.
- Expect ACOE to release the final on or about September 1, 2021.
- Issued WQC on March 24, 2021 can be found on MDE's website:
<https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/WQC.aspx>
- Maryland is encouraged by some of the changes in the proposed MDSPGP-6.

Proposed MDSPGP-6 Improvements



- Beneficial reuse of dredge material for living shoreline and beach nourishment projects.
- Eliminating the requirement that previously dredged area needed to be dredged within the past five years for maintenance dredging consideration.
- Excluding temporary impacts from impact totals for permit qualification under the MDSPGP categorization.
- Newly added e (11) - Aquatic Habitat Restoration activity which provides an additional (and more expedited) method to approve certain minor "restorative" projects.
- Standard operating agreement that an activity, if reduced and minimized, can be re-categorized into a Category A and returned to MDE allowing MDE to issue on behalf of the Corps.

Navigable Waters Rule Waters of the US



- Maryland has comprehensive state laws in place to protect and restore waterways and wetlands within state boundaries.
- Currently, ephemeral streams (i.e., streams that have a bed and bank but no perennial flow and no contact with groundwater) are the only waterways which, as a matter of practice, Maryland has generally not considered jurisdictional under certain provisions of state law but which were now excluded as jurisdictional under the CWA.
- A reduced scope of federal jurisdiction could also result in the loss of protection that is otherwise provided for under Section 401 of the CWA.
 - This would occur in situations where the federal government is issuing a license or permit to a facility with a discharge to a water, but where that water is no longer considered a water of the United States under the CWA.

Navigable Waters Rule



- In considering revisions at any time to the definition of waters of the U.S., Maryland is focused on how such changes to reduce the scope of federal jurisdiction will or will not help advance the work we are doing in Maryland to protect and restore our waters, including the Chesapeake Bay.
 - This would include how activities upstate of Maryland are regulated or if the federal floor is lowered that those states lower their protections.
- MDE has not experienced a change in process due to our robust regulatory program.
- Option to request a Jurisdictional Determination from USACE if there is a conflict or questionable decision on waters.

Contact



Heather L. Nelson, Manager
Wetlands and Waterways Program
Federal Consistency Coordinator
Maryland Department of Environment
hnelson@maryland.gov
410-537-3528